

STATE OF MAINE
SUPREME JUDICIAL COURT
NOTICE AND OPPORTUNITY FOR COMMENT
ON

Proposed Amendments to
Maine Rules of Appellate Procedure

Comments Due on or Before Friday April 30, 2010

The Supreme Judicial Court is considering a proposed new Rule 12B and proposed amendments to Rules 5(d), 8(b), 10, 16(2) and 19(c) of the Maine Rules of Appellate Procedure. The principal proposed amendments would: (1) clarify practice regarding public access to appeal proceedings and documents filed with the Court; (2) adjust and clarify timing and filing requirements in several rules; and (3) amend motion filing practice. The amendments are explained in the Advisory Notes.

The Court invites comments on the proposed amendments. Any comments should be filed with the Clerk of the Supreme Judicial Court by **Friday April 30, 2010**. Comments in writing should be mailed to the address below. Comments sent via e-mail may be in the text of an e-mail or in an attachment to an e-mail, addressed to: lawcourt.clerk@maine.gov. If the comments are in an attachment, the attachment must be a document in one of the following formats: plain text (.txt), Microsoft Word 1997-2004 (.doc), rich text format (.rtf), or portable document format (.pdf). The Clerk's Office will acknowledge receipt of the e-mail via a reply e-mail.

All comments must contain (1) the name, mailing address, and telephone number of the individual submitting the comments; and (2) the name, mailing address, and main telephone number of the organization (if any) on whose behalf the comments are submitted. An individual need not be an attorney to submit comments on behalf of an organization.

Dated: April 12, 2010.

Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, Maine 04101-4125
(207) 822-4146

DRAFT for Comment 4-12-10 DRAFT
STATE OF MAINE
SUPREME JUDICIAL COURT
AMENDMENTS TO THE
MAINE RULES OF APPELLATE PROCEDURE

2010 Me. Rules --

Effective: -----

All of the Justices concurring therein, the following amendments to the Maine Rules of Appellate Procedure are hereby adopted to be effective on the date indicated above. The specific amendments are stated below. To aid in understanding of these amendments, an Advisory Note appears after the text of each amendment. The Advisory Notes state the reason for recommending each amendment, but the Advisory Notes are not part of the amendments adopted by the Court.

1. Rule 5(d) of the Maine Rules of Appellate Procedure is amended to read as follows:

(d) Unavailable Transcript. In the event a hearing or trial was not recorded or a transcript of the evidence or proceedings at a hearing or trial cannot be prepared, the appellant ~~appellant's counsel~~ may prepare a statement of the evidence or proceedings from the best available means, including ~~counsel's~~ recollection, for use instead of a reporter's transcript. This statement shall be filed with the court and served on the appellee ~~appellee's counsel~~ within 21 days after entry of judgment or 14 ~~28~~ days after the filing of the notice of appeal, whichever occurs first. The appellee ~~Appellee's counsel~~ may file and serve objections or propose amendments thereto within 7 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and, as settled and approved, shall be included in the record on appeal.

Advisory Note

These amendments to Rule 5(d) clarify procedures in several respects.

First, as stated in M.R. App. P. 16(1) the references to appellant or appellee refer to the parties to the action, whether represented by counsel or not.

Second, Rule 5(d) only applies when a hearing was not recorded or, if the hearing was recorded, a transcript cannot be prepared because of a failure of the recording. If a transcript can be prepared, but the appellant elects not to purchase a transcript, the rule does not apply.

Third, the amendment ends current confusion about timing and trial court notice of the need to review and act on a proposed 5(d) statement. The amended rule requires that the draft statement and any responding objections or amendments be filed with the trial court at the same time that they are served on the other party. Further the timing is shortened so that the trial court will be more likely to have a fresher memory of the event. The proposed statement must be filed with the trial court and served on the other party no later than 21 days after entry of judgment or 14 days after filing the notice of appeal, whichever is sooner. It is anticipated that the trial court would act on the statement as expeditiously as possible, so that the statement could be filed as part of the record on appeal. The trial court would have discretion to reject a statement upon a finding that it did not accurately reflect the record upon which its decision was based.

2. Rule 8(b) of the Maine Rules of Appellate Procedure is amended to read as follows:

(b) Number of Copies; When Filed.

(1) Eight copies of the appendix shall be filed no later than 14 days after the date on which the appellant's brief is due to be filed. In child protective cases, the State shall file the appendix with the Court no later than 14 days before the date on which the appellant's brief is due to be filed. The parties may agree to a later time for the filing of the appendix without notice to or leave of the Law Court, provided that the appendix shall be filed no later than the date that the appellee's brief is filed or is due to be filed, whichever occurs first.

(2) When the appendix is filed with the Court, a copy shall be served on each other party to the appeal.

Advisory Note

Rule 8(b)(1) is changed to allow the parties to agree that the appendix will be filed later than the due date set by the rule. The court does not need the appendix until the appeal is ready for consideration on the briefs or for oral

argument. If each appellee does not object to receiving the appendix closer to the date the appellee's brief is due, then there is no reason to require permission from, or even notice to, the court to enlarge the time for the filing of the appendix. However, the appendix must be filed no later than the date that the appellee's brief is filed or is due to be filed, whichever occurs first. The appendix must be filed even if the appellee's brief is not filed by its due date.

3. Rule 10 of the Maine Rules of Appellate Procedure is amended to read as follows:

(a) Motions in General. Unless another form is prescribed by these rules, an application to the Law Court for an order or other relief shall be by motion, shall be typewritten, shall state with particularity the grounds therefor and shall set forth the order or relief sought. Supporting papers shall be served and filed with the motion. ~~Motions and supporting papers and any response thereto shall be typewritten and shall conform to subdivision (d) of this rule. Any party intending to file a response shall do so within 7 days after service of the motion. The same number of copies of a response shall be filed as are required for the motion to which it responds. The Law Court may shorten or extend the time for responding to any motion.~~ All motions will be disposed of on the papers acted on without oral argument unless otherwise ordered. Motions will not necessarily be granted even though assented to by other parties. Motions may be acted upon at any time, without waiting for a response thereto. The Chief Justice, or in the Chief Justice's absence, another justice designated by the Chief Justice, may act on motions on behalf of the Court, or may refer motions to the entire Court.

~~**(b) Motions for Procedural Orders.** A motion for a procedural order shall be accompanied by one copy of the motion and any supporting papers. For purposes of this rule, a motion for a procedural order is one that seeks an order pertaining to the time or manner in which an appeal shall proceed, such as an enlargement of time, admission of a visiting attorney, leave to file a brief as amicus curiae or substitution of parties pursuant to M.R. Civ. P. 25, or an order dismissing the appeal or imposing any other sanction including dismissal for noncompliance with the rules governing appeals, except Rule 2. The motion may be acted upon at any time, without awaiting a response thereto. The Chief Justice or, in the Chief Justice's absence, the senior available associate justice or another justice designated by the Chief Justice may dispose of motions for procedural orders on behalf of the Law Court.~~

(b) Certificate of Service Required. Every motion shall be served on the other parties and shall be accompanied by a certificate of service upon the other parties. If the certificate is not included with the motion, the Clerk of the Law Court shall return the motion as incomplete. The Clerk will not docket the attempted filing but will retain a copy and the notice of return. If the moving party refiles the motion with the proper certificate of service, the complete motion will then be accepted and docketed.

~~**(c) Motions for Substantive Relief.** A motion for substantive relief shall be accompanied by a supporting memorandum. An original and 7 copies of the motion, the memorandum, and any other supporting papers shall be filed. A motion for stay or other interim or emergency relief must be presented promptly. The motion will not be acted upon until after the Law Court has received a response or until the time for response as provided in subdivision (a) of this rule or set by the Law Court has passed. For purposes of this rule, a motion for substantive relief is any motion other than a motion for a procedural order or a motion for reconsideration pursuant to Rule 14(b).~~

(c) Responses. Any party intending to file a response to a motion shall do so within 7 days after the motion is filed. The Law Court may shorten or extend the time for responding to any motion and may act on a motion before receiving any response. Any supporting papers shall be served and filed with the response. Responses and supporting papers shall be typewritten and shall conform to subdivision (d) of this rule.

(d) Form of Motions and Other Papers; Number of Copies Required. ~~Papers~~ Motions, responses, and other papers not required to be produced in a manner prescribed by Rule 9(f) may be typewritten or otherwise duplicated upon opaque, unglazed paper 8 1/2 x 11 inches in size and shall be ~~bound on the left margin~~ stapled in the upper-left corner. The typed matter must be double spaced in at least 12 point type, except that footnotes and quotations may appear in 11 point type. ~~If copies are required, they must be legible.~~ Each paper shall contain a caption setting forth the name of the Court (i.e., the Supreme Judicial Court sitting as the Law Court), the title of the case, the Law Court docket number, and a brief descriptive title of the paper. The original and one legible copy of every motion, response, and other paper shall be filed. Additional legible copies shall be filed as requested by the Clerk of the Law Court.

Advisory Note

Rule 10 is amended to reflect practical experience of the Court in the nine years since the Maine Rules of Appellate Procedure took effect. The rule is changed substantially to: (1) remove the distinction between procedural and substantive motions; (2) require that every motion be accompanied by a certificate that the motion was served on the other parties; and (3) clarify the required format of motions and oppositions. The distinction between procedural and substantive motions was removed because it created confusion in practice, and frequently resulted in the incorrect number of copies of motions and responses being filed.

Motions for reconsideration of Law Court decisions are governed by M.R. App. P. 14(b).

M.R. App. P. 10(a). The language regarding responses to motions is removed from this subdivision and placed in subdivision (c) of this rule.

M.R. App. P. 10(b). The former subdivision (b) dealing with procedural motions is replaced with this subdivision, which requires that every motion be served on the other parties and accompanied by a certificate of service on the other parties.

M.R. App. P. 10(c). The former subdivision (c) dealing with substantive motions is replaced with this subdivision, which sets the time and requirements for responses to motions.

M.R. App. P. 10(d). Subdivision (d) is changed to: (1) apply to motions, responses, and other papers filed with the Law Court; (2) clarify that motions need not be bound along the entire left-hand side of the paper, but need only be stapled in the upper-left corner; (3) require the original and one copy be filed for every motion and response; and (4) provide that the filing party shall provide any additional copies to the Court as requested by the Clerk of the Law Court. The Court may request that the filing party file additional copies when it determines that the motion will be considered by the entire Court.

4. Rule 12B of the Maine Rules of Appellate Procedure is adopted to read as follows:

RULE 12B. PUBLIC ACCESS TO PROCEEDINGS AND RECORDS

(a) Record on Appeal. The record on appeal, or any portion of the record on appeal, shall be available for inspection and copying by any person to the same extent as in the trial court.

(b) Law Court File. The file maintained by the Clerk of the Law Court shall be available for public inspection and copying, except that any documents that were transmitted to the Law Court by the trial court and that were not available for public inspection or copying in the trial court shall be available for inspection and copying only to the same extent as in the trial court.

(c) Briefs. The briefs filed with the Law Court shall be available for inspection and copying by any person.

(d) Appendices. The appendix shall be available for public inspection and copying, except that the appendix shall not be available for inspection and copying by non-parties in an appeal from a child protection proceeding; proceedings involving an adoption or guardianship or a petition for adoption or guardianship; juvenile proceedings in which the record is sealed in the trial court; any proceeding in which the care, custody and support of a minor child is an issue; or any proceeding in which a document that is confidential by statute is contained in the appendix.

No appendix shall be filed as “under seal” or “confidential” except on order of the Chief Justice or other Justice designated to act for the Chief Justice pursuant to Rule 10(a).

(e) Oral Arguments. Oral arguments on the merits of appeals are public proceedings.

(f) Decisions. Opinions of the Law Court on appeals and decisions of single justices of the Law Court are public documents.

Advisory Note

Rule 12B is adopted to clarify for litigants and the public the extent to which oral arguments are public and records held by the Clerk of the Law Court are available for inspection and copying. Counsel and parties must be aware that filings that the parties make in the Law Court, including copies of any documents

that were also filed in the trial court, are generally available to the public without limitation.

Subdivision (a) provides that any materials that are transmitted by the trial court to the Law Court retain their public or confidential status while in the possession of the Law Court.

Subdivision (b) provides that the Law Court file is available to the public, except that documents transmitted *by the trial court* to the Law Court maintain their public or confidential status in the Law Court. Any document filed by a party is available to the public when it becomes part of the Law Court file, even if that document is a copy of a document that is in the trial court record and is confidential there. This subdivision is intended to protect from public inspection the docket sheets, transcript order forms, and notices of appeal in cases with statutory confidentiality requirements, including child protection, adoption, and guardianship proceedings; and presentence investigation reports filed as part of Sentence Review Panel appeals; and other documents entitled to statutory confidentiality that are transmitted by the trial court to the Law Court.

Subdivision (c) provides that briefs are available to the public without limitation.

Subdivision (d) provides that the appendix in an appeal is available to the public except in adoption, guardianship, child protection, and some juvenile proceedings; in any proceeding involving the care, custody or support of a minor child; and in any appeal in which the appendix contains a document that is confidential as part of the trial court record. An appellant or appellee should conspicuously label the appendix as confidential if it contains a document that is confidential by law, except in child protection, guardianship, adoption, and juvenile cases, when it is clear from the type of case that the appendix is confidential.

Subdivision (e) states that oral arguments of appeals are public.

Subdivision (f) states that Law Court opinions in appeals and decisions of single justices are public information.

If a party wishes to maintain the confidentiality of information that is otherwise public under this rule, the party may move to seal the information pursuant to Rule 14(c).

The confidentiality of information in a trial court record is determined by applicable statute, rule, or administrative order.

5. Rule 16(2) of the Maine Rules of Appellate Procedure is amended to read as follows:

(2) The word “Court” or “Trial Court” shall include any judge of the Probate Court, any judge of the District Court, any justice of the Superior Court, ~~and~~ any single justice of the Supreme Judicial Court, and any administrative agency from which an appeal lies directly to the Law Court.

Advisory Note

The amendment to Rule 16(2) clarifies that, unless the context requires otherwise, state administrative agencies from which there is a direct appeal to the Law Court are treated as if the agency was the trial court for purpose of application of these rules. The chief administrative executive of the agency would be treated as if that person were the clerk of the trial court.

6. Rule 19(c) of the Maine Rules of Appellate Procedure is amended to read as follows:

(c) Memorandum Required on Appeal. Within 21 days after the date on which the transcript is filed in the Law Court, or, if no transcript is ordered, within 21 days after filing a notice of appeal, the party filing the appeal shall file with the Clerk of the Law Court eight (8) ~~seven (7)~~ copies of a memorandum giving specific and substantive reasons why the issue or issues identified for prosecution of the appeal warrant the issuance of a certificate of probable cause authorizing consideration of the appeal on the merits by the Law Court. The memorandum shall not exceed 20 pages and shall otherwise conform to the requirements of M.R. App. P. 9(f) relating to the form of briefs. On motion and for good cause shown, the Law Court may allow additional time to file a memorandum.

No reply memorandum shall be filed by the State.

Until the Law Court rules on the request for a certificate of probable cause, no further briefing pursuant to M.R. App. P. 9 is required and no appendix pursuant to M.R. App. P. 8 shall be prepared.

Advisory Note

The amendment to Rule 19(c) changes the date on which the memorandum in support of the appellant's request for a certificate of probable cause in criminal discretionary appeals. Many appellants move to enlarge the time for their memoranda in order to be able to review the transcript before filing the memoranda. The Court does not review the memorandum until after the transcript is filed. The amendment changes the time for the filing of the memorandum to allow the appellant to receive and review the transcript before filing the memorandum. In cases where no transcript is ordered, the memorandum remains due 21 days after the notice of appeal is filed. The amendment also provides for 8 copies of the memorandum to be filed, so that one copy may be retained by the Clerk's Office and the remaining seven distributed to the Court.

7. These amendments shall be effective -----.

Dated: -----

FOR THE COURT¹

LEIGH I. SAUFLEY
Chief Justice

DONALD G. ALEXANDER
JON D. LEVY
WARREN M. SILVER
ANDREW M. MEAD
ELLEN A. GORMAN
JOSEPH M. JABAR
Associate Justices

¹ This Rules Amendment Order is approved after conference of the Court, all Justices concurring therein.